

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

72
104 U.S. App 159

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,981

814

THOMAS C. KEININGHAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 14 1962

Joseph W. Stewart

CLERK

KENNETH D. WOOD

**401 Third Street, N. W.
Washington 1, D. C.**

Attorney for Appellant

(i)

STATEMENT OF QUESTIONS PRESENTED

I.

Whether it was error for the Trial Court to hold that a police officer has the right to interrogate a person not charged with a crime and where the officer is not investigating a crime.

II.

Whether it was error for the Trial Court to hold that the officer had a right to seize the brief case of appellant where there was no warrant for his arrest and where appellant had committed no offense in the officer's presence.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,981

THOMAS C. KEININGHAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.,

Appeal from Judgment of United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based on Title 28, U.S. Code,
Section 1291, and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Appellant was indicted on two counts. Count One charged the operation of a lottery in the District of Columbia on December 11, 1961, and Count Two the possession of papers and writings used in the operation of a lottery.

Deputy Chief John B. Layton, of the Metropolitan Police Department, Washington, D. C., on December 11, 1961, observed appellant in the 700 Block of Twelfth Street, N. W., Washington, D. C., getting out of a taxicab (J.A. 5). Appellant left the rear door of the cab, having in his hand a brown leather brief case. He walked over to the curb and passed close to Layton. (J.A. 5). Layton went north on Twelfth Street, stopped, looked back and noticed that appellant had walked into a doorway of the Lowdermilk Book Store at 715 Twelfth Street, N. W. (J.A. 5). After observing appellant for a few moments, Layton walked back to appellant and noticed that the brief case appellant had been carrying had been placed behind appellant. (J.A. 5). He noticed, as he was observing appellant, prior to his going to where appellant stood, that appellant was looking in his (Layton's) direction. (J.A. 6). Layton stated he spoke to appellant, saying, "Hello, Tom," and that appellant replied, "Hello, Inspector." (J.A. 7). Objection was made at this point to any conversation between appellant and Layton. (J.A. 7). Layton asked him what he was carrying and he replied, "nothing" (J.A. 7). Layton told appellant he was referring to the brief case, and appellant said, "That's not mine." (J.A. 7). Layton asked him whether he had just alighted from a cab with it and carried it to the sidewalk, and the appellant said "No." (J.A. 7). Layton asked him if he had any idea what the brief case contained, and appellant "denied that he had any knowledge of the contents of the brief case or that it was his, or that he knew anything about it." (J.A. 7).

Layton then testified, "I remarked that I thought that was careless for a brief case to be left on the sidewalk area, and remarked also that there might be money in the brief case." Appellant is then alleged to

have said "he had no idea what was in it and if I (Layton) was interested in it he suggested I examine the brief case, look in it." (J.A. 8).

At this point, Layton opened the brief case and observed "a quantity of money and slips and records which were readily identifiable as number slips, which I recognized. After observing this, I placed the defendant under arrest." (J.A. 8).

Layton testified, prior to finding the money and number slips in the brief case, he had not touched appellant nor had he indicated that appellant was under arrest. (J.A. 8). Layton then identified the briefcase that he had "seized in front of 715 Twelfth Street" (Tr. 17).

Layton testified that he knew appellant as having been arrested previously. (J.A. 8).

Layton related that the brief case which he had identified was the one appellant had in his hand when he got out of the taxicab. (J.A. 9). He stated he did not have a warrant for appellant's arrest. (J.A. 9).

He further stated that at the time he approached appellant, appellant was not committing an offense, (J.A. 9), and that it was after he had examined the contents of the brief case that he placed appellant under arrest. (J.A. 9). Layton also related that when appellant got out of the cab "it appeared to me that Keiningham did look at me." (J.A. 9).

A preliminary motion to suppress the evidence was duly filed, and argued before Judge Holtzoff on February 2, 1962. That motion was denied. Appellant renewed his motion at the conclusion of the government's evidence (J.A. 10), which was denied. Appellant was found guilty on both counts of the indictment.

STATUTES INVOLVED

Amendment IV - Constitution of The United States

Searches and Seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF POINTS

1. It was error for the Trial Court to hold that a police officer has the right to interrogate a person not charged with crime and where the officer is not investigating a crime.

2. It was error for the Trial Court to hold that the officer had a right to seize the brief case of appellant where there was no warrant for his arrest and where appellant had committed no offense in the officer's presence.

SUMMARY OF ARGUMENT

At the outset, it is the position of appellant, the accosting of appellant by the officer, who had no warrant for his arrest, was unlawful. The appellant had committed no offense in the presence of the officer, and the interrogation of appellant was a process adopted by the officer, tantamount to undue mental duress, which the officer hoped would give rise to an excuse for placing appellant under arrest. Questioning, without arrest, was unlawful at common law. Appellant further contends that at the time the officer accosted appellant and questioned him concerning the brief case, it was required by law that he possess probable cause so to do. This was not an instance where an officer was investigating a crime. At the moment he accosted appellant and asked what the brief

case contained an arrest occurred. Unless it is found from the evidence that probable cause was present, the arrest was unlawful and the subsequent seizure invalid.

It is also appellant's contention, should this Court conclude that the officer had the right to inquire as to the contents of the brief case, that the arrest then did not occur until after the search by the officer. The arrest then, was incident to the search and not a search incident to an arrest.

Appellant contends that when the officer inquired as to what appellant was carrying in the brief case, it became obvious to him that an arrest had occurred or was about to occur. When considered with the additional factors that the participants were known to each other; that each had seen the other when appellant alighted from the cab; that the officer stationed himself in a doorway a short distance away and continued to observe appellant, when the officer then confronted him and inquired as to the contents of the case the statement by appellant that the brief case was not his was in effect a denial of guilt occasioned by the implied duress and coercion inherent in the question. The alleged invitation on the part of the appellant that the officer examine the contents, is a further indication that appellant considered himself under arrest and was attempting to disassociate himself from the contraband he knew the officer would find therein.

Inasmuch as the record is devoid of any facts that permit a finding of probable cause prior to appellant's being accosted, it is contended that the resultant search and finding of incriminating evidence was the basis for the arrest, and was, therefore, incident to the search.

ARGUMENT

I-A

**Questioning Of Appellant By Officer
Was Unlawful**

Appellant contends that the questioning by the police officer was unlawful, and as a result thereof, the seizure of incriminating evidence was invalid.

As to the unlawful interference on the street by the officer, Moreland in his Modern Criminal Procedure, at Page 49 observed:

"Questioning, without arrest, is unlawful at common law. Questioning, without arrest, has a close relationship to the use of the 'third degree', a kind of undue mental and/or physical duress sometimes used by the police in their efforts to ferret out crime."

Alexander's, The Law of Arrest, Volume I, at Page 348, when discussing the questioning of citizens by the police, relates:

"It depends upon the 'circumstances' including the time, place, number of persons, condition of such persons, knowledge that a crime has been committed; it may not be proper under suspicion, but needs some basis of fact to justify the minimum of detention, and possible, search of person or property."

In Trilling v. United States, 104 U.S. App. D.C. 159, 260 F.2d 677, while this Court was concerned, in its opinion, with statements made while in custody, the following footnote appears on Page 168, setting forth the British rule:

"By the law of this country no person ought to be made to incriminate himself, and no police officer has any right to put searching questions to a person to find out whether an offense had been committed or not by him. If there is evidence of an offense, a police officer is justified in putting questions to a suspected person to ascertain whether there are reasonable grounds for arresting him."

In Trilling, on Page 171, the following quote from Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 35 L. ed. 734:

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Again in Trilling, at Page 183, the following appears:

"I think, if the circumstances are that the police are investigating a crime and asking available persons relevant questions, they are performing a proper function." (underlining supplied)

The above quote from Trilling would seem to mean, that where a crime has been committed, and the police are in the process of that investigation, a proper function is being performed by the police in questioning suspects. In the instant case, the arresting officer had no knowledge that a crime had been committed. There had been no observations made of appellant; there was no evidence that the neighborhood had a reputation for numbers activity; it was in the heart of the business district and the appellant was carrying a brief case, not a brown paper bag.

To summarize, Moreland states that questioning, without arrest, was unlawful at common law, and that such interrogation has a close relationship to the use of the "third degree." Alexander relates that, to be permissible, the ingredient of "knowledge that a crime has been committed" must be present, and that the "minimum of detention" needs some basis of fact.

The British rule holds that an officer has no right to question to determine "whether an offense has been committed." And the quote in Trilling, at Page 183, sanctions relevant questions where the police "are investigating a crime."

I-B

**Sanction of Confronting Where Probable Cause
Exists For Arrest**

This Court has had numerous occasions to determine whether the confronting of persons suspected of crime was permissible and whether probable cause existed to permit arrest.

In Jackson v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, the police were tracing a pistol, one of a number of items stolen in a housebreaking, and pawned in the name of one John Keyes. Questioning of Keyes revealed additional information which resulted in appellant's arrest at his home without a warrant. Even where the police had knowledge that a crime had been committed, and with additional information supplied by Keyes, this Court was concerned with the question of whether there was sufficient probable cause for the arrest in concluding that probable cause existed, stated:

"Standing alone no one factor of information constituted probable cause. The question is whether considered together all the information was enough."

The Court's attention is invited to the information available to the officer in the present case. The officer stated that he knew the appellant as having been arrested previously for lottery violations. There was no showing in the record as to whether the arrest was of recent origin. There also was no testimony that the carrying of a brief case by appellant would be significant to the officer inasmuch as there was no testimony as to whether appellant, when previously arrested, was a clerk, or a "pick-up man." No observations had been conducted of appellant; the officer had no knowledge that a crime had been committed; he was not committing an offense at the time the officer accosted him and there was no warrant for his arrest.

In Dixon v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, this Court sanctioned the confronting of persons where four men, one

known to be a safebreaker, meeting upon signal, handling women's clothes, including a fur piece, bearing price tags, on the curb of a narrow street at midnight.

In Campbell v. United States, 109 U.S. App. D.C. 109, 289 F.2d 775, where officers knew of a report of personal property stolen from an automobile, patrolling the area involved, saw a car moving with its lights out four or five blocks from the place where the larceny had been reported, stopped the car and asked the driver if he knew his lights were out. There were numerous articles of clothing in the rear seat and a fur coat. This Court held that "these circumstances" called for prompt police action. Here, the car was running without lights; there on the back seat was clothing with no adequate explanation as to how they were acquired, forthcoming. There are no such circumstances in this case calling for police action.

In Ellis v. United States, 105 U.S. App. D.C. 86, 264 F.2d 372, where officers were "specially assigned" to look for the perpetrator of a series of day-time housebreakings in a particular area, saw appellant go up on a porch, knock on the door, look around the area and then depart. He was called to the car, appeared nervous, dropped his money, chewing gum and cigarettes. A bulge in his inside pocket brought on a search which revealed items that were used against him. The Court said:

"Taking all of these circumstances together, we think the officers had probable cause to make this arrest.

". . . the circumstance that the officers found on Ellis' person, items which incriminated him, cannot, of course, provide any part of the necessary showing of probable cause."

In the instant case the officer was not "specially assigned" on this occasion and there were no circumstances such as were present in Ellis.

In Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180, two detectives were engaged in "the investigation of narcotic activities" and called a known drug addict and another over to the police car. The

addict, Palmer, came over. The other ran to a nearby house. Here the Court stated:

"The Courts in various opinions have said that officers in the course of an investigation may ask questions before making an arrest."

In the instant case there was no investigation, the officer involved is no longer assigned to the Gambling and Liquor Squad, according to his testimony that assignment was concluded in March, 1960. (J.A. 4).

In Green, this Court said:

"Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him."

In a dissenting opinion in the same case, Judge Bazelon stated:

"The majority says that if appellant had remained standing where he was first accosted the police would have lacked probable cause either to arrest or to search him. That is certainly true."

In Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, where officers observed a car running two blocks without lights, stopped it and inquired of the driver regarding his license and observing some forty cartons of cigarettes on the back seat, and where appellant's companion made a motion to reach under the seat, whereupon the officer ordered both men out of the car, probable cause was abundant. Driving without lights is an offense and an unsatisfactory answer regarding possession of the cigarettes was held sufficient. This Court related:

"Officers patrolling the streets at night do not pre-arrange the setting. . . . They are required as a matter of duty to act as reasonably prudent men would act under the circumstances as those circumstances happen.

". . . The situation was a sudden, unanticipated development.

"Perhaps no one of these circumstances, taken separately, would spell probable cause. We do not say it would. The officer was faced with a combination of circumstances."

In the case at bar there were no "combination of circumstances" that required action by the officer. This was not a "sudden, unanticipated development." Even in Bell this Court said no one of these circumstances would spell probable cause.

In Lee v. United States, 95 U.S. App. D.C. 156, 221 F.2d 29, the police were "investigating a murder." Jewelry had been stolen from the premises where the murder occurred. Upon receiving information that a man was attempting to sell jewelry on U Street, an appointment was made by the police. An accosting of the defendant resulted in his arrest. This Court said:

"The officers had no warrant. However, they clearly had a right, indeed it was their duty, investigating a murder and with the information upon which they acted, to approach, confront and interrogate the accused."

There were no such circumstances here that would justify "approaching, confronting or interrogating" appellant.

In Ellison v. United States, 93 U.S. App. D.C. 1; 206 F.2d 476, officers were investigating the robbing of a drug store, the pattern bringing to mind Ellison, the officers went to his home, observed bottles and cigarettes outside his house. This Court held:

"Here the officers conduct was entirely reasonable from start to finish. They were reasonable in their initial suspicion that Ellison had committed the second crime; reasonable in endeavoring to locate him for questioning; reasonable in thinking their suspicions confirmed by the objects seen on his grounds; and reasonable in undertaking the arrest and search."

In Ellison a crime had already been committed. The modus operandi was that of appellant, and there was displayed in his yard, in open view,

incriminating evidence. The Court concluded 'Here, the total atmosphere — the total situation — is such as to lead us to sustain the officers' action.'

I-C

**Circumstances of Confronting By Officer
Amounted to Arrest**

Appellant contends that the confronting by the officer, when considered with the answers made by appellant to his questions, leaves no doubt but that appellant considered himself under arrest. On the other hand, the officer testified that after he had opened the brief case, he placed the appellant under arrest (J.A. 7-8).

In Alexander's, The Law of Arrest, Volume I, at Page 358, in discussing circumstances which amount to an arrest, includes the following:

"Detaining, to examine or investigate one not yet accused of crime."

"Stopping one and demanding to know what he has in his hand, pocket, package, box, valise or on his person."

In a dissenting opinion in Ellis v. United States, 105 U.S. App. D.C. 86, 264 F.2d 372, Judge Edgerton made the following comment:

"The defendant was arrested as soon as the police accosted him, for he must have known at once, that he was no longer free to walk away."

In Rios v. United States, 364 U.S. 253, 4 L.Ed. 2d 1688, where two police officers approached a standing taxicab, the Supreme Court queried:

"If therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident."

In Kelley v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, this Court said:

"Whether or not the police deemed the appellant under arrest when he was accosted at the counter, he would have been rash indeed to suppose he was not under arrest by the time he got outside the business establishment."

In the instant case, while the officer determined that he had not arrested appellant until he looked into the brief case, it is respectfully represented that in view of the interrogation by the officer concerning the contents of the brief case and the reply given by appellant, that he, the appellant, had submitted to what he considered an arrest and was attempting to disassociate himself from the contraband he knew to be in the brief case.

Again in Kelley, this Court approved an instruction as to when an arrest is said to have occurred which read in part:

"It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence."

In Henry v. United States, 361 U.S. 98, 28 LW 4015, the Supreme Court indicated:

"The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case.

"When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.

"It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough."

Further in Henry, the Court stated:

"What transpired at or after the time the car was stopped by the officers is, as we have said irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses.

"Under our system suspicion is not enough for an officer to lay hands on a citizen."

Brinegar v. United States, 338 U.S. 160; 93 L.Ed. 1879, is distinguished by appellant in the following particulars:

In Brinegar "the officers were patrolling the highway in the discharge of their duties." Here, the officer was no longer a member of the Gambling Squad, and the record is devoid of evidence that he was in the neighborhood of the arrest in the discharge of his duty as a policeman.

In Brinegar the Court noted that "they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings." Here, while the officer recognized appellant, there was no evidence of recent personal contact; there had been no observation by the officer of appellant, nor was there evidence of appellant "lately engaged" in a lottery.

In Brinegar, ". . . driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure." Here, there was no evidence that there was a known "numbers drop" in the area, nor was there evidence that would permit the conclusion that the "circumstances indicating no other probable purpose than to carry on his illegal adventure."

Further in Brinegar, the Court said:

"One who recently and repeatedly has given substantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs."

In the case at bar, there was no evidence of recent and repeated grounds for believing that appellant was engaged in a lottery in the area

in which he was arrested. Brinegar also appears to require the additional fact that the officer "knew" of that circumstance at the time he makes the interception.

While there was no search of a home here, appellant contends that the alleged "invitation" to search the brief case does not amount to consent as evidenced by the holdings of this Court in Judd v. United States, 89 U.S. App. D.C. ___, 190 F.2d 649, and Higgins v. United States, 93 U.S. App. D.C. 340, 209 F.2d 819.

In Judd this Court in its opinion observed:

"... He may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied.

"Thus, 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations by force.

"A finding of consent in such circumstances has been held to be 'unfounded in reason.'

"Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the smalltime criminal.

"Comparable statements have been held insufficient where the victim of the search was safely in his home, his place of business or his automobile."

In Higgins, this Court stated:

"If a valid confession precedes a search by police, permission may show true consent to the search.

"But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."

Here, appellant respectfully contends that the circumstances of the accosting by the police officer, the conversation that followed, indicate that appellant considered himself in a state of arrest. There being

no probable cause prior to the accosting, the arrest should fail. If, as testified to by the officer, the arrest was not made until the search, it becomes an arrest incident to a search.

In conclusion, the alleged "invitation" to search the bag should be viewed in light of the Judd and Higgins cases. It is appellant's position that interrogation by the officer respecting the contents of the brief case constituted duress, and that a finding of consent or invitation would be 'unfounded in reason' and since his denial of possession would be a 'denial of guilt,'

"No sane man . . . would be willing that policemen search . . . for contraband which is certain to be discovered."

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be reversed and the appellant be granted a new trial.

KENNETH D. WOOD

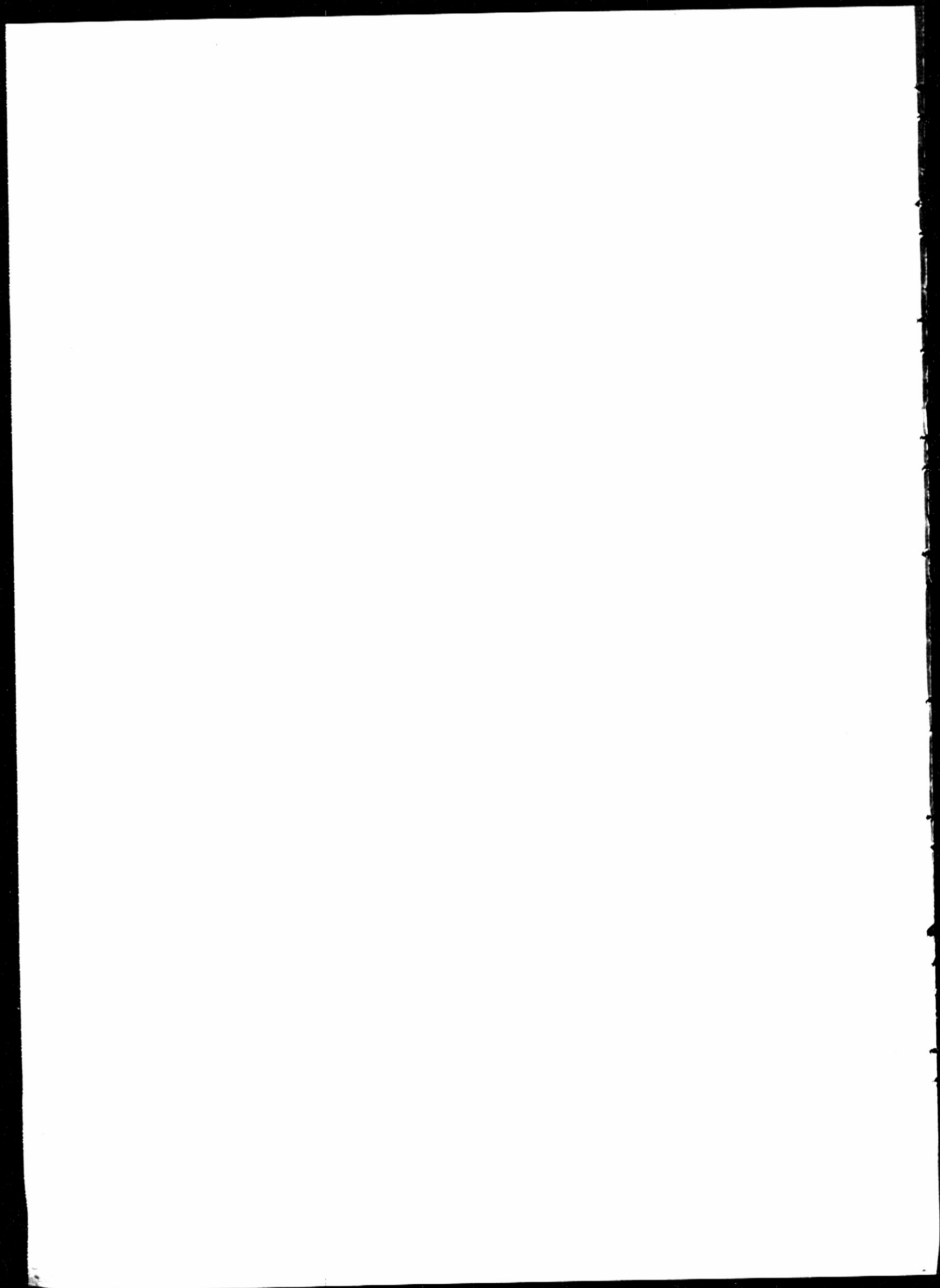
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(i)

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JOINT APPENDIX

[Filed Jan. 8, 1962]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on Nov. 2, 1961, Sworn in on Nov. 7, 1961

The United States of America	:	Criminal No. 35-'62
vs.	:	Grand Jury No. 1487-61
Thomas C. Keiningham	:	Vio. 22 D.C.C. 1501, 1502
	:	(Operating Lottery)
	:	(Poss. of numbers slips)

The Grand Jury charges:

On or about December 11, 1961, within the District of Columbia, Thomas C. Keiningham was concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about December 11, 1961, within the District of Columbia, Thomas C. Keiningham knowingly had in his possession and under his control, notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

/s/ David C. Acheson

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ John L. McCloskey
Deputy Foreman.

[Filed Jan. 26, 1962]

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant, by his attorney, and respectfully moves the Court to suppress all evidence seized from the defendant on December 11, 1961 by a member of the Metropolitan Police Department, and that said evidence obtained be suppressed as evidence against the defendant in any criminal proceeding.

The defendant alleges that the evidence obtained was seized against his will and without any right in law.

/s/ Kenneth D. Wood
Attorney for Defendant
401 Third Street, N. W.
NA 8-1779

[Certificate of Service]

[Filed Feb. 2, 1962]

[Denial of Defendant's Motion to Suppress Evidence]

On this 2nd day of February, 1962, came the attorney of the United States, the defendant in proper person and by counsel, Kenneth Wood; whereupon the defendant's motion to suppress evidence, coming on to be heard, after argument by counsel, is by the Court denied. The defendant is allowed to remain on bond.

By direction of
Alexander Holtzoff
Presiding Judge
Criminal Court # One

* * *

HARRY M. HULL, Clerk

By /s/ J. Richard Earle, Jr.
Deputy Clerk

[Filed March 14, 1962]

WAIVER OF TRIAL BY JURY

With the consent of the United States Attorney and the approval of

the Court, the defendant waives his right to trial by jury.

/s/ T. C. Keiningham
Defendant

/s/ Kenneth D. Wood
Attorney for Defendant

I Consent

/s/ F. G. Smithson
Asst. United States Attorney

APPROVED

/s/ Luther W. Youngdahl
Judge

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
Wednesday
March 14, 1962

The above-styled cause came on before THE HONORABLE
LUTHER W. YOUNGDAHL, United States District Judge, at approxi-
mately 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Government:

FREDERICK G. SMITHSON, Esq.
Assistant U. S. Attorney

On behalf of the Defendant:

KENNETH D. WOOD, ESQ.

* * * * *

3

PROCEEDINGS

THE DEPUTY CLERK: Case of United States versus Thomas C.
Keiningham.

MR. SMITHSON: Your Honor, the Government is ready. I under-
stand from counsel for the defendant that the defendant, Thomas C.
Keiningham, desires to waive a trial by jury. This is acceptable to the
Government and I understand the Clerk has the prepared form. I be-
lieve, Your Honor, that there should be some interrogation of the defendant.

THE COURT: Yes.

Will the defendant approach the bench? Step up to the microphone, please.

Mr. Keiningham, your attorney has advised the Court that you desire to waive a jury trial in this case. Is that correct?

DEFENDANT KEININGHAM: Yes, sir.

THE COURT: You understand you are entitled to a jury trial, we have a jury here ready to give you a fair trial, but it is your own wish voluntarily to not have a jury. The Court is willing under the circumstances to try the case without a jury. I want to be sure though that you understand.

DEFENDANT KEININGHAM: Yes, sir.

THE COURT: We have a jury waiting to hear the case.

DEFENDANT KEININGHAM: Yes, sir.

4 THE COURT: All right, sign the waiver.

* * * * *

7 JOHN B. LAYTON

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SMITHSON:

* * * * *

8 Q. And at any period of time since 1936, sir, have you been in charge of the Gambling and Liquor Squad? A. I have been. First in 1954 to about 1956, that's March of 1956; and then again from November 1957 until March of 1960.

Q. All right, sir. Now I would like to direct your attention to the date of December 11, 1961, in the afternoon hours. I will ask you if you had occasion to be on Twelfth Street at that particular date and time.

A. I did, sir.

Q. About what hour were you there? A. About 2:35 to 2:40.

Q. And what particular block of Twelfth Street? A. The 700 Block of Twelfth Street.

Q. Is this a place in the District of Columbia? A. It is, sir.

Q. Is it in the Northwest section of the city? A. Yes, sir.

Q. Now while you were there, sir, did you observe anyone?

9

A. I did.

Q. Whom did you observe? A. I observed the defendant, Thomas Keiningham.

Q. Where did you first observe him? A. I observed him getting out of a taxicab which had stopped just approaching the fire house in the 700 Block of Twelfth Street, Northwest.

* * * * *

Q. All right. Now, when you saw this man, what was he doing, this person? A. Keiningham left the rear door of the taxicab in company with another individual. He had in his hand at the time a brown leather briefcase. He walked over to the curb and passed very closely to me at that time. I was walking north. As he got to the sidewalk he turned south on Twelfth Street.

* * * * *

10 Q. Now, as the defendant came to that curb, did you have any conversation with the defendant? A. Not at that moment.

Q. Did you have any conversation that morning or that time?

11 A. Shortly afterwards I did.

Q. All right, sir. Now you say you were headed north? A. That's correct.

Q. When you observed the defendant Keiningham did you know him? A. I did.

Q. All right. And by virtue of what you had knowledge of him, what did you do? A. I continued north on Twelfth Street just to the north side of the fire house and stopped, looked back and noticed that Keiningham had walked into a doorway between the show windows of the Lowdermilk Book Store at 715 Twelfth Street, Northwest.

After standing for a few moments and observing that Keiningham remained in that opening in front of Lowdermilk's Book Store, I turned and walked back to where he was standing. At that time I observed that

the briefcase he had been carrying was on the sidewalk to his rear, behind where Keiningham was standing.

Q. In a public area? A. Yes. It was on the sidewalk.

THE COURT: When you say it was on the sidewalk, do you mean by that that it was not in the area where he had been standing in the doorway of the book store?

12 THE WITNESS: He was standing on the sidewalk area, Your Honor, in front of the doorway of Lowdermilks.

THE COURT: He was not actually in the doorway. Is there sort of an open entrance to this book store?

THE WITNESS: The show windows of the book store project out from the building line approximately two feet, two to three feet.

THE COURT: So there is an open space from where you get from the end of the windows to the door?

THE WITNESS: That's correct, sir.

THE COURT: About two feet you say?

THE WITNESS: Two to three feet.

THE COURT: And it was in that space he was standing?

THE WITNESS: In that space.

THE COURT: Where was the briefcase in reference to that space?

THE WITNESS: The briefcase was to his rear.

THE COURT: In that two-feet space then?

THE WITNESS: That's correct, Your Honor, closer to the building line than Keiningham was standing.

BY MR. SMITHSON:

13

* * * * *

Q. Did you observe whether or not he was looking in the north or the south direction? A. I noticed that Keiningham did look in my direction.

Q. At the time you were observing him, sir, did you see the briefcase in his hand? A. I did not see the briefcase in his hand.

Q. All right. You say you returned — you turned and went south and approached where the defendant was; is that correct? A. That's correct.

Q. Is that when you had this conversation that you have related? A. That's correct. As I approached Keiningham, I then had a conversation with him.

Q. Would you relate that to us? A. My first conversation with him, I spoke to him, said, "Hello, Tom." He said, "Hello, Inspector." I said, "What are you carrying?"

14 MR. WOOD: May it please Your Honor: I don't like to interrupt the Deputy Chief, but since my motion is directed to this portion of the Government's case, I would like the record to show that I am objecting now to the testimony the Deputy is about to give with respect to his conversation with Keiningham, so I may be protected.

THE COURT: What is the ground, Mr. Wood, of your objection?

MR. WOOD: Of my objection?

THE COURT: Yes.

MR. WOOD: Well, Your Honor, I am not sure when an arrest took place at this point, and in order that I be not waiving my objection to the incident on Twelfth Street, I would like to enter an objection now, if I may, to anything from this point.

THE COURT: What time was the arrest made, Officer?

THE WITNESS: The time of the arrest was about 2:40 p.m.

THE COURT: I mean with reference to the talk — before the talk or after the talk?

THE WITNESS: After the talk, Your Honor.

THE COURT: Go ahead.

The record may show your objection, Mr. Wood.

* * * * *

15 THE WITNESS: I asked him what he was carrying. He patted his coat and pants pockets and said, "Nothing." I said, "I mean in the briefcase." He said, "That's not mine."

I asked him whether or not it wasn't a fact that he just carried that from the taxicab, gotten out of the taxicab with it and carried it to the sidewalk. He said no, that he didn't know anything about the briefcase.

I asked him if he had any idea what the briefcase contained. He denied that he had any knowledge of the contents of the briefcase or that it was his or that he knew anything about it.

I remarked that I thought that was careless for a briefcase to be

left on the sidewalk area, and remarked also that there might be money in the briefcase. He said well he had no idea what was in it and if I was interested in it he suggest I examine the briefcase, look in it.

16 At this point I did open the briefcase and observed a quantity of money and slips and records which were readily identifiable as numbers slips, which I recognized. After observing this, I placed the defendant under arrest.

BY MR. SMITHSON:

Q. Had you touched him, sir, prior to determining there was money and number slips in that briefcase? A. I did not.

Q. Did you pat him down? A. I did not, sir.

Q. At any time did you indicate to him that he was under arrest by any command or any gesture that would indicate to anyone that you had placed him under arrest? A. I did not, sir.

* * * * *

THE COURT: Did I understand you to say after you examined the contents of the briefcase you then placed him under arrest?

THE WITNESS: That's correct, Your Honor.

* * * * *

19 BY MR. SMITHSON:

Q. Inspector, I'd like to ask you, since the point is raised as to the reasonable cause for your action, at the time you observed the defendant Thomas Keiningham on this date in 1961, was he known to you?

A. He was.

Q. And in what way was he known to you, sir? A. He was known to me by having been arrested previously by members of the Gambling and Liquor Squad for violations of the gambling statutes on several occasions.

* * * * *

Q. Now when you arrested the defendant after you had recovered this particular property, did you take him anywhere? A. I did, sir.

Q. Where did you take him? A. I took him first to my cruiser parked in the 1200 Block of H Street, Northwest, and from that point

20 transported him to the office of the Gambling and Liquor Squad at Police Headquarters.

Q. Did you talk to him, sir, at Headquarters? A. I did.

Q. I'll ask you, sir, whether or not the defendant made any statement of possession or denied possession of this material at Headquarters.

A. The defendant continued to deny possession or any control or ownership over any of the material seized in the briefcase.

* * * * *

21 CROSS EXAMINATION

BY MR. WOOD:

* * * * *

Q. Now did you have a warrant for Keiningham's arrest? A. No, sir, I did not.

Q. And at the time you approached him in the doorway of Lowdermilk's Book Store was he committing an offense at that time? A. He was standing just outside of the door. The briefcase that he had carried from the taxicab was sitting on the sidewalk area immediately behind him.

Q. I understand that, but my question was, Deputy Layton, whether or not at the time you approached him in the doorway of Lowdermilk's, whether he was committing an offense in your presence at that time.

A. I wasn't aware of his committing an offense until after I examined the briefcase.

Q. And it was after you looked in the briefcase that you arrested Mr. Keiningham? A. That is correct, sir.

22 * * * * *

Q. Yes, sir. Now, when you saw Keiningham get out of the cab, Deputy, did he look at you at that time? A. I looked at him, and it appeared to me that Keiningham did look at me.

Q. Now when you approached him in the doorway you spoke to him. I think you said Hello, Tom? A. I did, sir.

Q. And he said Hello, Inspector? A. That's correct, sir.

Q. And then you asked him about the briefcase? A. I asked him first what he was carrying, and then asked him, directed his attention

to the briefcase.

23 Q. I understand, but when you asked him about the briefcase I believe you told us that he suggested that you examine it; is that right, sir? A. He did.

Q. Now, will you tell us exactly what he said to you about examining the briefcase? A. He said, "Why don't you open it, Inspector?"

Q. That's what he said? A. Yes, sir.

Q. Had you said anything to him about the contents of the briefcase before he is supposed to have said that to you? A. I did ask him if he had any idea what the briefcase contained and he said No.

* * * * *

32 MR. WOOD: We desire to offer no testimony, Your Honor. I would like to renew my motion to suppress.

THE COURT: Then the defendant rests as far as the testimony?

33 MR. WOOD: Yes, sir, we rest.

THE COURT: All right. The record may show a renewal of the motion. It would now be a motion for judgment of acquittal, for a finding of not guilty by the Court inasmuch as I am trying the merits of the case. * * * Yes, on the basis that — your ground, as I understand it, is that the officer had no right to arrest — you had better state to me what your ground is.

MR. WOOD: All right, sir.

May it please Your Honor, our position is this: When Deputy Chief Layton approached Keiningham on Twelfth Street he had no warrant for his arrest. There has been no indication of any probable cause to arrest without a warrant. And Keiningham was committing no offense in the presence of Deputy Chief Layton when he approached him, or after Layton had approached him did he commit any offense.

Now we say further that the arrest did not occur according to Deputy Chief Layton until after he had looked in the briefcase, examined its contents and at that time he says he placed him —

THE COURT: I think that is conceded.

MR. WOOD: Yes.

34 THE COURT: Is it your position, Mr. Wood, that the Deputy had no right to ask the defendant a question about the briefcase, that that wasn't legal procedure for him.

MR. WOOD: Yes, sir, that is one of my positions.

THE COURT: He didn't have any right to ask him any question?

MR. WOOD: No, sir, I don't think so.

THE COURT: He wasn't detaining him. There is no claim that there was an attempt to detain him at that time. I take it your position is that the Deputy had no right — having seen him come from the taxicab with this briefcase, that he had no right to ask him, inasmuch as he had seen it in his hands and later he saw it on the ground, this naturally would create some suspicious circumstance. Under that circumstance the Deputy had no right to ask him whether it was his or not?

MR. WOOD: I don't think he did, no, sir.

THE COURT: And that is the illegality that you claim?

MR. WOOD: That is just part of it. Because our position is also that since the Deputy had no probable cause to make an arrest, that the arrest was incident to a search.

* * * * *

[Filed March 30, 1962]

MEMORANDUM OPINION

This case was tried to the Court after waiver of jury trial. Defendant offered no evidence to refute the government's testimony as to the commission of the offenses charged in the indictment. Defendant raised solely the legal question as to the legality of the arrest and the subsequent seizure of the briefcase and its contents.

The pertinent facts in this case are as follows: At approximately 2:35 P.M. on December 11, 1961, Deputy Chief John Layton of the Gambling Squad, Metropolitan Police Department, had occasion to be on the 700 block of 12th Street, N. W. in the District of Columbia. At that time he observed defendant Keiningham alighting from a cab together

to the briefcase.

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[Filed March 30, 1962]

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with another individual whose identity is unknown. Defendant carried a rather large brown briefcase. Keiningham and Layton passed close to each other. Layton testified that Keiningham saw him at that point. The police officer had had previous professional contacts with the defendant and knew him as a frequent violator of the District's gaming laws. Layton proceeded up the street but stopped and looked back at the defendant. Keiningham had now situated himself between the show windows of a book store; the briefcase was no longer in his hand. Layton walked back toward the defendant and observed that the briefcase had been placed on the public sidewalk several feet from the defendant. As Layton approached Keiningham, the following conversation ensued:

Layton: "Hello Tom."

Keiningham: "Hello Inspector."

Layton: "What are you carrying?"

Keiningham then patted his coat and pants pockets and said, "Nothing."

Layton: "I mean in the briefcase?"

Keiningham: "That's not mine."

Layton: "Hadn't you just carried that from the cab?"

Keiningham: "No, I don't know anything about the briefcase."

Layton: "Do you have any idea what it contains?"

Keiningham: "No, I don't know anything about it."

Layton then remarked that it was careless to leave something like that around and that it might contain valuables.

Keiningham: "I have no idea, why don't you examine it."

Layton then looked inside the briefcase and observed a quantity of money as well as slips and records readily identifiable as "numbers" paraphernalia. He then placed defendant under arrest; the time was 2:40 P.M.

The defendant claims that the above stated evidence must be suppressed because (1) the arresting officer had no right to question the defendant, and (2) the subsequent seizure of the briefcase and its contents was illegal and the arrest of Keiningham was effected without probable cause.

Inspector Layton observed Keiningham getting out of a cab with the

heavily loaded briefcase in his hand; he knew defendant to be a frequent violator of the gambling laws; Keiningham recognized Layton and subsequently attempted to rid himself of the briefcase with its incriminating contents. These were the facts known to Layton when he approached the defendant. These suspicious and peculiar circumstances were such as to reasonably indicate to Layton that a crime had been or was about to be committed.^{1/} Therefore, the Inspector not only had the right, but it was his duty to question the defendant.^{2/}

At this juncture Layton did question Keiningham with regard to the briefcase. However, defendant was not placed under arrest until after Layton inspected the contents of the briefcase with defendant's approval. It is evident from the conversation that took place, as well as the surrounding circumstances, that Inspector Layton did not detain or restrain defendant prior to that time.^{3/} Upon inspection of the contents of the

^{1/} The circumstances upon which Inspector Layton acted in this case are similar to those in Brinegar v. United States, 338 U.S. 160 (1949), where the Supreme Court affirmed the lower court's finding that the seized evidence was properly admitted. In that case petitioner was convicted of violation of the Liquor Enforcement Act of 1936 for transporting liquor into Oklahoma contrary to the laws of that state. It appeared that one of the Federal officers who had made the search and seizure had arrested petitioner five months previously for illegally transporting liquor; that he had previously seen petitioner load liquor into a car in Missouri, where the sale of liquor was illegal; and that he knew petitioner had a reputation for hauling liquor. On this occasion, the officers recognized petitioner and his car, which appeared to be heavily loaded, gave chase, and forced the car to the side of the road. Petitioner was thereupon interrogated and subsequently arrested.

^{2/} Alexander, The Law of Arrest §45 at 348 (1949).

For the purpose of preserving the peace and to prevent crime, in the performance of their legal duty, a peace officer or a private person may make reasonable inquiry of persons coming under his observation, or brought to his knowledge, under circumstances which reasonably suggest that a crime has been or is about to be committed. It is the right, and the duty, of an officer to question a person as to any other matter which, under the circumstances, it is reasonably proper for him to know.

^{3/} "[T]he term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued even for a short period of time." Long v. Ansell, 63 App. D.C. 68, 71 (1934).

bag, there can be no doubt that "probable cause" for arrest was shown to exist.^{4/} At that point a legal arrest took place and Keiningham was informed that he was being taken into custody.

^{4/} Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a belief by a man of reasonable caution that a crime is being committed. Brinegar v. United States, 338 U.S. 160 (1949).

/s/ Luther W. Youngdahl
Judge

March 28, 1962

[Filed April 5, 1962]

JUDGMENT AND COMMITMENT

On this 2nd day of April, 1962, came the attorney for the government and the defendant appeared in person and by his Attorney Kenneth Wood, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of VIOLATIONS OF TITLE 22, Sections 1501 and 1502 OF THE DISTRICT OF COLUMBIA CODE, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) to twelve (12) Months on Count 1; One (1) year on count 2; said counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

* * *

/s/ Luther W. Youngdahl
United States District Judge

[Filed April 2, 1962]

NOTICE OF APPEAL

Name and address of appellant - Thomas C. Keiningham
2216 Evergreen Place
Portsmouth, Va.

Name and address of appellant's attorney - Kenneth D. Wood
401 Third St., N. W.

Offense - Operating Lottery; Possession Numbers Slips

Concise statement of judgment or order, giving date, and any sentence -

April 2, 1962 - Count #1 - 4 months to 12 months

Count #2 - 12 months

Name of institution where now confined, if not on bail.

I, the above-named appellant, hereby appeal to the United States
Court of Appeals for the District of Columbia Circuit from the above-
stated judgment.

/s/ T. C. Keiningham
Appellant

/s/ Kenneth D. Wood
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,981

THOMAS C. KEININGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

DAVID C. ACHESON,
United States Attorney.

NATHAN J. PAULSON,
FREDERICK G. SMITHSON,
WILLIAM C. WETZEL, JR.,
Assistant United States Attorneys.

United States Court of Appeals

for the District of Columbia Circuit

FILED JUL 6 1962

Joseph W. Stewart

CLERK

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Did any inquiry of appellant by the police officer constitute *ab initio* an arrest of appellant where it is evident from the conversation that took place and from the surrounding circumstances that the officer did not detain or restrain appellant until after the conversation?
2. Did the officer legally inspect a briefcase, previously seen in appellant's possession, where uncontradicted testimony shows that appellant voluntarily and unequivocally abandoned the briefcase and invited the officer to inspect it?

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for violations of 22 D.C.C. 1501 (Operating a Lottery) and 22 D.C.C. 1502 (Possession of numbers slips). A pre-trial motion, made to suppress evidence seized at the time of appellant's arrest was denied on February 2, 1962. Subsequently, on March 14, 1962 the case was tried by the Court (Luther W. Youngdahl, J.). On March 30, 1962, appellant was found guilty of both counts of the indictment. He was sentenced on April 5, 1962 to a term of imprisonment of "four (4) to twelve (12) months on count 1 (22 D.C.C. 1501); one (1) year on count 2 (22 D.C.C. 1502); said counts (sic) to run concurrently." This appeal followed.

At trial, appellant offered no evidence to refute the government's testimony as to the commission of the offenses charged in the indictment. Appellant raised solely the legal question as to the legality of his arrest and the seizure of a briefcase and its contents at the time of his arrest. On March 30, 1962, Judge Youngdahl filed in the District Court a Memorandum Opinion stating findings of fact relative to that question.

Findings of Fact By the Trial Court¹

"The pertinent facts in this case are as follows: At approximately 2:35 P.M. on December 11, 1961 (J.A. 4), Deputy Chief John Layton of the Gambling Squad, Metropolitan Police Department (Tr. 7, 8; J.A. 4), had occasion to be on the 700 block of 12th Street, N.W. in the District of Columbia (J.A. 4, 5). At that time he observed defendant Keiningham alighting from a cab together with another individual whose identity is unknown (J.A. 5). Defendant carried a rather large brown briefcase. (J.A. 5. The briefcase and its contents were introduced into evidence—Tr. 20). Keiningham and Layton passed close to each other (J.A. 5). Layton testified that Keiningham saw him at that point (J.A. 6, 9). The police officer had had previous professional contacts with the defendant and knew him as a frequent violator of the District's gaming laws (J.A. 8). Layton proceeded up the street but stopped and looked back at the defendant (J.A. 5). Keiningham had now situated himself between the show windows of a book store (J.A. 5); the briefcase was no longer in his hand (J.A. 6). Layton walked back toward the defendant (J.A. 5) and observed that the briefcase had been placed on the public sidewalk several feet from the defendant. (J.A. 5, 6; the briefcase was to the rear of Keiningham). As Layton approached Keiningham, the following conversation ensued:

¹ Contents within parentheses interspersed through opinion are not part of the opinion. They have been added to indicate the testimony upon which the court's findings are based.

Layton: "Hello Tom". (J.A. 7)

Keiningham: "Hello Inspector." (J.A. 7)

Layton: "What are you carrying?" (J.A. 7)

Keiningham then patted his coat and pants pockets and said, "Nothing" (J.A. 7).

Layton: "I mean in the briefcase?" (J.A. 7)

Keiningham: "That's not mine." (J.A. 7)

Layton: "Hadn't you just carried that from the cab?" (J.A. 7)

Keiningham: "No, I don't know anything about the briefcase." (J.A. 7)

Layton: "Do you have any idea what it contains?" (J.A. 7)

Keiningham: "No, I don't know anything about it." (J.A. 7)

Layton then remarked that it was careless to leave something like that around and that it might contain valuables. (J.A. 7, 8)

Keiningham: "I have no idea, why don't you examine it". (J.A. 8, 10)

Layton then looked inside the briefcase and observed a quantity of money as well as slips and records readily identifiable as "numbers" paraphernalia. (J.A. 8). He then placed defendant under arrest (J.A. 8); the time was 2:40 P.M. (J.A. 7)."

Further Testimony

It was stipulated that the contents of the briefcase were slips, notations and receipts used in the operation of a numbers lottery (Tr. 23) Corporal Joseph Palmisano testified that the briefcase contained 797 numbers slips (Tr. 27); that the "total amount of play" the slips represented was \$4,201.99 (Tr. 27); and that 104 different codes were used, each code being assigned to a particular writer. (Tr. 26).

Deputy Chief Layton testified that he did not consider appellant under arrest until after he had examined the briefcase (J.A. 7, 8). He did not touch appellant prior to determining there was money and number slips in the briefcase (J.A. 8). And, at no time prior to examining the briefcase did Deputy Chief Layton "pat" appellant down or indicate to appellant "that he was under arrest by any command or any gesture that would indicate to anyone that you (Layton) had placed him under arrest" (J.A. 8).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1501 provides:

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promotion, or advertising a policy lottery, policy shop, or lottery.

Title 22, District of Columbia Code, Section 1502 provides:

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Title 22, District of Columbia Code, Section 306(a) and (b) provides:

(a) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of any section listed in subsection (b), by police officers, as in the case of a felony, upon probable cause that the person arrested is violating the section involved at the time of the arrest.

(b) Subsection (a) shall apply with respect to section 22-3601 (possession of implements of crime), sections 22-3203, 22-3204, and 22-3214, providing for the control of dangerous weapons in the District, and section 22-1502 (possession of lottery tickets).

SUMMARY OF ARGUMENT

Appellant's arrest and the seizure of the briefcase at the time of the arrest were legal. Appellant's motion to suppress the briefcase was properly denied. Having knowledge of appellant's background and having observed appellant's suspicious actions, Deputy Chief Layton had a right to question appellant. The inspection of the briefcase prior to appellant's arrest was legal since appellant voluntarily abandoned the briefcase and voluntarily invited the officer to inspect it. The inquiry of appellant did not constitute an arrest. Appellant was not arrested until after the officer had inspected the briefcase. After the inspection, the Deputy Chief could legally arrest appellant for violations of 22 D.C.C. 1501 and 1502 committed in his presence.

**Appellant Was Not Arrested Until After Deputy Chief
Layton Had Inspected The Briefcase**

This court defined the meaning of the term, "arrest", in the leading case of *Long v. Ansell*, 63 App. D.C. 68, 71, 69 F.2d 386, 389, *aff'd*, 293 U.S. 76 (1934).² The court stated:

Thus it appears that the word 'arrest' has a well defined meaning. There must be some detention of the person to constitute arrest . . . 'An arrest is the seizing of a person and detaining him in the custody of the law.' From these authorities, it may be concluded we think, that the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time.

In its written opinion, the trial court made specific reference to this criteria set forth in *Long v. Ansell*, *supra*, and found that:

"However, defendant was not placed under arrest *until after Layton inspected* the contents of the briefcase with defendant's approval. It is evident from the conversation that took place, as well as the surrounding circumstances, that Inspector Layton did not detain or restrain defendant prior to that time (J.A. 13).

The testimony in this case compels that conclusion. Appellant's contention that the arrest occurred prior to the inspection of the briefcase is totally unsupported by the record in this case. Deputy Chief Layton testified (J.A. 8):

A: . . . At this point I did open the briefcase and observed a quantity of money and slips and records which were readily identifiable as numbers slips, which I recognized. *After observing this, I placed the defendant under arrest.*

² This language was recently quoted with approval in *Coleman v. United States*, — U.S. App. D.C. — (No. 15915 decided September 8, 1961).

Q: Had you touched him, sir, prior to determining there was money and number slips in that briefcase?

A: I did not.

Q: Did you pat him down?

A: I did not, sir.

Q: At any time did you indicate to him that he was under arrest by any command or any gesture that would indicate to anyone that you had placed him under arrest?

A: I did not, sir.

* * * *

The Court: Did I understand you to say after you examined the contents of the briefcase you then placed him under arrest?

A: That's correct, Your Honor.

Appellant offered no testimony to refute this. This testimony of Deputy Chief Layton is uncontradicted. As Judge Youngdahl stated, there is nothing in the conversation between Layton and appellant or in the surrounding circumstances to indicate that appellant was in any way detained or restrained of his liberty prior to the inspection of the briefcase. The time and place of the meeting do not suggest a restraint on appellant's liberty. The incident occurred in the afternoon on the sidewalks of a business district of Washington. The conversation itself reflects an atmosphere of casualness and informality not indicative of any intention by Layton or understanding by appellant that an arrest had taken place prior to the inspection of the briefcase.

In order to find on this record that appellant was arrested prior to the inspection of the briefcase, appellant is forced to adopt the position that any inquiry of appellant by Layton was *per se* illegal and therefore constituted an arrest of appellant. This position is untenable. It is not the law of this jurisdiction.

The propriety and legality of Deputy Chief Layton's inquiry of appellant cannot be seriously disputed. As Judge Burger stated in *Goldsmith v. United States*, 107 U.S. App. D.C. 305, 314, 277 F.2d 335, 344 (1960): "It would be absurd to suggest that police must arrest a person before they

can ask him questions." A policeman, independent of his power to arrest, may make inquiry of persons coming under his observation. *Dixon v. United States*, — U.S. App. D.C. —, 296 F.2d 427 (No. 16263 decided October 19, 1961); *Campbell v. United States*, — U.S. App. D.C. —, 289 F.2d 775 (No. 15,820, decided March 30, 1961); *Nash v. United States* (No. 16,015. Aff'd by order, Feb. 14, 1961); *Ellis v. United States*, 105 U.S. App. D.C. 86, 264 F.2d 372, cert. denied, 359 U.S. 998 (1959); *Bell v. United States*, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958); *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958); *Lee v. United States*, 95 U.S. App. D.C. 156, 221 F.2d 29 (1954); *Ellison v. United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953); *Jackson v. United States*, 146 A.2d 577 (D.C. Mun. App. 1958), petition for allowance of appeal denied, D.C. Cir., No. 14921, March 13, 1959; *Larkin v. United States*, 144 A.2d 100 (D.C. Mun. App. 1958), reversed on other grounds, 108 U.S. App. D.C. 239, 281 F.2d 72 (1960); *Brooks v. United States*, 159 A.2d 876 (D.C. Mun. App. 1960); *Dickerson v. United States*, 120 A.2d 588 (D.C. Mun. App. 1956)

This right of inquiry by the policeman is essential to the effective performance of his duty—the prevention and detection of crime. It is not dependent upon the policeman having prior knowledge that a crime has already been committed. This Court has never recognized such an unrealistic restriction. In the *Green*, *Dixon*, *Nash*, *Dickerson*, and *Brooks* cases cited *supra*, the inquiry was made prior to any report of a crime having been committed. The Courts held such inquiries entirely proper.

The government submits, that were this Court to adopt the restriction proposed by appellant, namely one restraining the policeman from any investigatory inquiry prior to his receiving the report of a crime having been committed, this Court would seriously and unreasonably impair the efficient and effective prevention and detection of crime in this jurisdiction.

The particular inquiry at issue in this case was convincingly reasonable. As Judge Youngdahl stated in his

opinion, the observations of appellant by Layton and his knowledge of appellant's background furnished reasonable provocation for the inquiry.

"Inspector Layton observed Keiningham getting out of a cab with the heavily loaded briefcase in his hand; he knew defendant to be a frequent violator of the gambling laws; Keiningham recognized Layton and subsequently attempted to rid himself of the briefcase and its incriminating contents. These were the facts known to Layton when he approached the defendant. These suspicious and peculiar circumstances were such as to reasonably indicate to Layton that a crime had been or was about to be committed. Therefore, the Inspector not only had the right, but it was his duty to question the defendant." (J.A. 12, 13)

The place and manner of inquiry were reasonable. The inquiry took place on a public sidewalk, a place where the Deputy Chief had a right to be and a place where appellant had no claim to privacy. The inquiry itself consisted of a polite and informal conversation dispelling any connotation of duress.

II

The Inspection Of The Briefcase Prior To Appellant's Arrest Was Proper Since Appellant Had Abandoned The Briefcase And Had Invited The Officer To Inspect It

Deputy Chief Layton's inspection of the briefcase was legal. After the inspection, not only did the officer have probable cause that appellant had violated 22 D.C.C. 1501 and 1502,³ but also he had actually seen the crimes committed in presence.

The colloquy between appellant and Layton prior to the inspection of the briefcase reveals that appellant voluntarily and unequivocally abandoned the briefcase. When Layton asked appellant about the briefcase, appellant

³ Under 23 D.C.C. 306, the officer could arrest appellant for his violation of the misdemeanor, 22 D.C.C. 1502, under the same probable cause criteria by which he could base a felony arrest for 22 D.C.C. 1501.

explicitly denied all ownership of, right or interest in, and knowledge of it. Appellant stated: "That's not mine. . . . No, I don't know anything about the briefcase" (J.A. 7, 12). Further evidence of the voluntariness of the abandonment is the fact that appellant attempted to rid himself of the briefcase by placing it on the sidewalk several feet behind himself even before Layton confronted him and conversed with him. Being abandoned property, the briefcase could lawfully be inspected by Layton. *Abel v. United States*, 362 U.S. 217 (1960); *Hester v. United States*, 265 U.S. 57 (1924); *Lee v. United States*, 95 U.S. App. D.C. 156, 221 F.2d 29 (1954). Certainly, if the officers firing their pistols near Hester did not cause him to abandon his jug, if the officer asking Lee out of his car did not cause him to drop the napkin and jewelry from the automobile, and if the arrest by the Immigration agents did not cause Abel to abandon the false identification cards in his hotel room, then in the instant case Deputy Chief Layton's inquiry did not coerce appellant into abandoning the briefcase.

Appellant not only abandoned the briefcase, he also expressly consented to Deputy Chief Layton's inspection of it. Indeed, appellant did more than merely negatively consent to the inspection. He invited the inspection. Deputy Chief Layton made no request to inspect the briefcase. The inspection resulted from the invitation of appellant. Appellant told Layton: "Why, don't you open it, Inspector?" (J.A. 10). This invitation was freely and voluntarily given. There were no promises, no touching of appellant and no threats.

There is not here present the sort of tainted consent which this court criticized in *Higgins v. United States*, 93 U.S. App. D.C. 340, 209 F.2d 819 (1954); *Judd v. United States*, 89 U.S. App. D.C. 64, 190 F.2d 649 (1951); and *Kelley v. United States*, — U.S. App. D.C. — (No. 16413, decided December 22, 1961). In *Judd*, the so-called "consent" came after arrest and several hours of constant questioning in the middle of the night. In *Higgins*, the tainted "consent" also came apparently after arrest

and after the police officer had gone with the defendant to the defendant's room and had invaded the privacy of the defendant's dwelling. In *Kelley*, the alleged "consent" consisted of acquiescence by Kelley to the demands of an officer who "told him to come outside" and then asked what the defendant had in his pockets. Each of these cases thus involved acquiescence under circumstances strongly flavored of duress. The circumstances of the instant case—an informal conversation, of short duration, prior to any arrest, occurring on the public sidewalks of downtown Washington in the afternoon hours—are devoid of any indication of duress. Moreover, the uncontradicted testimony of Layton shows that in the instant case appellant did not merely passively consent to the inspection but invited the inspection.

In *Jackson v. United States*, 146 A.2d 577 (D.C. Mun. App. 1958), the policeman arranged to see the defendant in a poolroom. Upon meeting the defendant, the officer suggested to the defendant that they go to the precinct for their discussion. At the precinct, the police officer asked to see any money the defendant had on his person. The defendant produced a one dollar bill, the serial number of which corresponded to those on money which had been stolen. The Municipal Court of Appeals affirmed Jackson's conviction, holding that the defendant was not arrested until after he had produced the dollar bill and that the defendant had voluntarily consented to the inspection of the bill prior to his arrest. This Court denied a petition for allowance of appeal from that decision (D.C. Cir., 14921, March 13, 1959). The instant case would appear to be *a fortiori* from the Jackson case, in that, the place of the conversation, a public sidewalk rather than a police precinct, would seem to have an atmosphere less conducive to duress.

In *Nash v. United States* (No. 16015, affirmed by order of this Court dated February 14, 1961), the officer approached the defendant who he knew as a drug addict and inquired of the defendant regarding the recency of the defendant's use of narcotics. The officer observed some

books in appellant's arms and asked the defendant what he was reading. The defendant voluntarily handed the books to the officer who started to thumb through them. In so doing the officer came upon a brown envelope. The officer asked what was in the envelope and the defendant replied "narcotics". The officer examined the envelope and arrested the defendant. This Court affirmed the conviction per curiam without opinion. Appellant's invitation and abandonment in the instant case evidences voluntariness more clearly than Nash's passive consent.

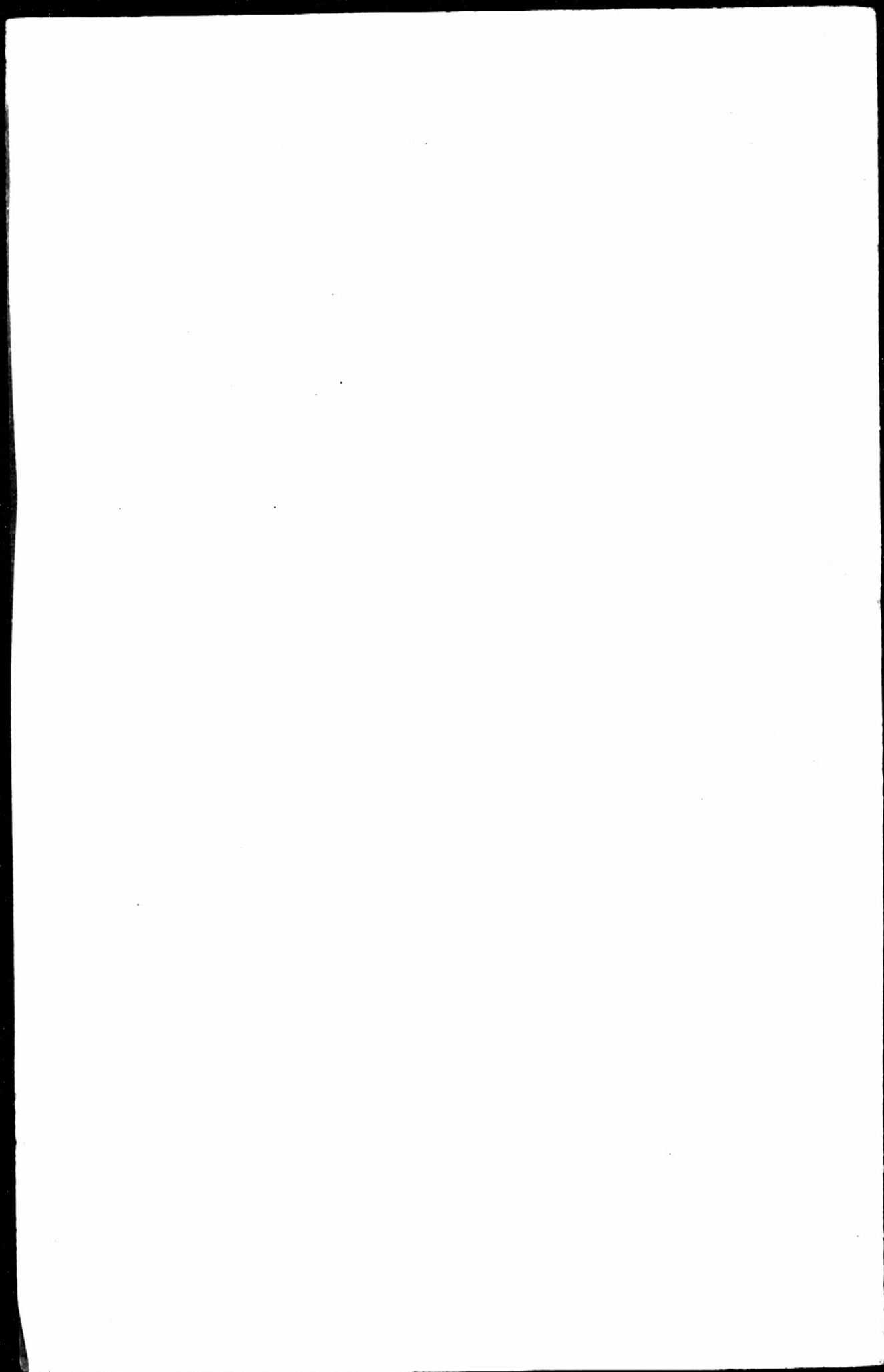
The particular facts of this case are uniquely convincing of the fact that appellant voluntarily abandoned the briefcase and voluntarily invited the officer to inspect the briefcase. Accordingly, Deputy Chief Layton's inspection of the briefcase was proper and lawful.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 16,981

FILED AUG -2 1962

Joseph W. Stewart

CLERK

THOMAS C. KEININGHAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING IN BANC

Comes now the appellant, by his attorney, and moves this Court to permit rehearing before the Court in banc. It is respectfully submitted that the issue summarized herein is most appropriate for consideration by the full Court.

Briefly, the factual situation was as follows. Appellant alighted from a cab carrying a briefcase, in the 700 block of Twelfth Street, N.W., on December 11, 1961. Officer Layton and appellant saw each other as appellant departed the taxicab. Each was known to the other. Appellant stood in a doorway and the officer also stood in a doorway a short distance

away. After a short period of time the officer approached appellant and a conversation ensued. The brief case had been placed on the ground beside him by the appellant. The officer inquired as to what was in the briefcase and the appellant denied that it was his. After further conversation the officer opened the briefcase and found incriminating evidence therein.

Appellant's first contention was that the questioning by the officer was unlawful. There was no probable cause, no warrant of arrest and no suspicious circumstances which would permit of an accosting by the officer. As the officer testified in the trial court, "I wasn't aware of his committing an offense until after I examined the briefcase" (JA 9).

Appellant set forth in his brief, a host of cases decided by this Court which sanctioned the accosting of persons on the street. Each of those are easily distinguished from the instant case.

Appellant next contended that the confronting by the officer constituted an arrest. Appellant's answers to the questions propounded by the officer clearly indicated that he considered himself under arrest. Authority for this position was set forth in appellant's brief. The conduct of the officer in the instant case amounted to an arrest both at common law and under the present British rule. The Supreme Court, in Henry v. United States, 361 U.S. 98, 28 LW 4015, cited in appellant's brief, supports appellant's position.

Under these circumstances, this Court, on July 19, 1962, dismissed this appeal as "frivolous," in a per curiam opinion. If a citizen, standing on a sidewalk, violating no statutes of the District of Columbia, can be confronted by a police officer who, "wasn't aware of his committing an offense until after the briefcase was examined," then indeed this was a "frivolous" appeal.

The Court in its opinion relates first, "that the circumstances warranted the officer in making some inquiry about the ownership of the briefcase which was abandoned in the presence of the officer."

Title was not involved here. As to the possession of the briefcase, the officer testified he saw appellant depart the taxicab with it in his hand. There were no "circumstances" present which either "warranted" or permitted interrogation by the officer.

As regards "abandonment in the presence of the officer," the briefcase was still in the constructive possession of appellant -- he had not walked away and left it there. The alleged "invitation" to search the briefcase should be viewed in light of the Judd and Higgins cases. If placing a briefcase at your side on the sidewalk is "abandonment," Work v. United States, 100 U.S. Appeals D.C. 237, held that the placing of materials in a trash can was not.

The Court's opinion recites that the officer had seen appellant in possession of the briefcase, and this conclusion is supported by the officer's testimony. Under these circumstances, the officer knew appellant had possession of the briefcase and knowing that, had no right to examine the contents thereof. It would have been otherwise, had the officer not been apprised of appellant's possession.

CONCLUSION

For the foregoing reasons, appellant respectfully represents that there exists here a violation of appellant's rights under the Constitution of The United States, and that this petition for rehearing in banc should be granted.

KENNETH D. WOOD

401 Third Street, N. W.
Washington, D. C.

Attorney for Appellant

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for purposes of delay.

KENNETH D. WOOD

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing in Banc was mailed, postage prepaid, this 1st day of August, 1962, to David C. Acheson, United States Attorney, U. S. Court House, Washington, D. C.

Kenneth D. Wood